Petition

Office
U.S.
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

81-1108

No. ...-...

IN THE

Supreme Court of the United States

October Term, 1981

MITCHELL HERMANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BARRETT S. LITT,
617 South Olive Street,
Los Angeles, Calif. 90014,
(213) 623-8000,
Counsel of Record for Petitioner,
BENNIE LAZZARA, JR.,
610 West DeLeon,
Tampa, Florida 33606,
(813) 251-2309,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Where a federal grand jury subject/witness had presented government documentation indicating F.B.I. field office electronic surveillance references to him, did he have "just cause" to decline to testify when the government first denied such field office surveillance in the Court of Appeals, through an unsworn, unspecified and hearsay representation which the witness had no opportunity to rebut?

2. Whether denial of electronic surveillance of a federal grand jury subject/witness by state agencies is required where the witness has shown extensive federal-state agency cooperation in the instant investigation and in past investigations of the same subjects, and where there has been an exceptional history of federal and state investigations of these subjects?

3. Whether a governmental failure to deny electronic surveillance of a federal jury subject/witness' premises, or any surveillance outside of the District, for the year prior to his appearance is adequate where the witness resided outside the District and where federal criminal investigations of the same subjects occurred outside the District?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 10

1. The Acceptance of a Hearsay, Unsworn Denial of Electronic Surveillance Submitted for the First Time in the Court of Appeals Is Contrary to the Practice of This Court and Other Courts of Appeals, and Presents an Important Question on the Proper Implementation of 18 U.S.C. §3504 11

2. The Circumstances Under Which a §3504 Claim Requires Disclosure of State Agency Electronic Surveillance Is an Important Question of Statutory Construction and Federal-State Relations, and the Decision Below Established a New and Confusing Standard in Conflict With the Hitherto Existing Federal and State Law 14

   A. The Record Below Conclusively Established Federal-State Cooperation in the Investigation 14

   B. The Decision Below Established a New and Confusing Standard in Conflict With Current Federal and State Law 19

3. The Holding Below That the Government's Failure to Deny Electronic Surveillance of the Witness' Premises, or Any Surveillance Outside the District, Conflicts With Other Circuit Decisions and With the Decisions of This Court 21

Conclusion 23

Page

Appendix. Appeal from the United States District Court for the Middle District of Florida (November 10, 1981) ..... App. p. 1

HILL, Circuit Judge, Concurring in Part and Dissenting in Part 16

Order, Filed June 18, 1981 21

TABLE OF AUTHORITIES

Cases	Page
Alderman v. United States, 394 U.S. 165 (1969)	22, 23
Beverly v. United States, 468 F.2d 732 (5th Cir. 1972)	22
Brummit, In re, 613 F.2d 62 (5th Cir. 1980)	11
Buscaglia, In re, 518 F.2d 77 (2nd Cir. 1975)	13, 14
Charles Batdorf, Grand Jury Witness, In the Matter of, No. CR Misc. [M11-88] (S.D.N.Y. 1980)	15
Church of Scientology, In re, Petitioner, No. 79-2318 (D.C. Cir.), pp. 27-28	16
Cruz v. Alexander, 477 F.Supp. 516, appeal dismissed mem., 622 F.2d 573 (2nd Cir. 1980) and 509 F.Supp. 640 (S.D.N.Y. 1980)	19
Elkins v. United States, 364 U.S. 206 (1960)	21
Evans, In re, 452 F.2d 1239 (D.C. Cir. 1971)	11
Gelbard v. United States, 408 U.S. 41 (1972)	8, 10, 11, 13, 14, 23
Goldberg v. Kelly, 397 U.S. 254 (1970)	13
Harris, In re, 383 F.Supp. 1036 (N.D. Cal. 1974)	19
Korman v. United States, 486 F.2d 926 (7th Cir. 1973)	12, 13
Marx, In re, 451 F.2d 466 (1st Cir. 1971)	12
Merrell and Francine Vannier v. Superior Court of Los Angeles County, No. LA 31418 (Cal. Sup. Ct., May 13, 1981)	17
People v. Cruz, 357 N.Y.S.2d 709 (1974)	19
Quinn, In re, 525 F.2d 222 (1st Cir. 1975)	12, 20
Santangelo v. People of the State of New York, 374 N.Y.S.2d ... (1975), reversed on other grounds, 381 N.Y.S.2d 472 (1975)	19

Page

State v. Chaitkin, 135 N.J. Super 179 (Essex County Ct. Law Div. 1975) 19

United States v. Ahmad, 347 F.Supp. 912 (M.D. Pa. 1972) 22

United States v. Alter, 482 F.2d 1016 (9th Cir. 1973) 12, 13, 22

United States v. Cruz, 594 F.2d 268 (1st Cir. 1979) 22

United States v. Egan, 408 U.S. 41 (1972) 8, 11, 13

United States ex rel. McCann v. Adams, 320 U.S. 222 (1943) 13

United States v. Mary Sue Hubbard, et al., Crim. No. 78-401 (D.D.C.) 15

United States v. Scafide, 564 F.2d 633 (2nd Cir. 1977) 22

United States v. Sinor, 238 F.2d 271 (5th Cir. 1956) 13

United States v. Smilow, 472 F.2d 1193 (2nd Cir. 1973) 12

United States v. Weiner, 418 F.Supp. 941 (M.D. Pa. 1976) 20

Vandeyacht v. United States, No. 75-3290 (9th Cir. 11-24-75) 20

Miscellaneous

Public Law 96-462, Sec. 9(i) 7

Publication

Clearwater Sun, 11-18-79, pp. 2C, 9A 15, 16

Statutes

United States Code, Title 18, Sec. 1826(a) 7

United States Code, Title 18, Secs. 2510-20 .... 19, 21, 22

Page

United States Code, Title 18, Sec. 2510 3
United States Code, Title 18, Sec. 2510(11) 22
United States Code, Title 18, Sec. 3504 .....
..... 2, 3, 4, 5, 10, 11, 14, 19, 20, 21
United States Code, Title 18, Secs. 6001 et seq. 3
United States Code, Title 28, Sec. 1254(1) 1
United States Code, Title 28, Sec. 1826 2

Textbook

La Fond, "The Grand Jury Witness and Electronic Surveillance," Oregon Law Review, 57:247-288, 264 (1977-78) 11, 12

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1981

MITCHELL HERMANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner Mitchell Hermann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 10, 1981.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Order of the District Court for the Middle District of Florida, entered on June 17, 1981, and not reported, also appears in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 10, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED.

United States Code, Title 28:

§1826. Recalcitrant Witness

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

United States Code, Title 18:

§3504. Litigation Concerning Sources of Evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States —

(1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June

19, 1968, or because it was obtained prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act or use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

United States Code, Title 18:

§2510. Definitions.

(11) ". . . Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

STATEMENT OF THE CASE.

The grand jury before which Petitioner Hermann appeared below is investigating allegations against the Church of Scientology (sometimes hereafter the "Church") and its members to determine whether Church members, employees or adherents violated federal law. On June 10, 1981 Mr. Hermann was subpoenaed to appear before the grand jury, which is sitting in the Middle District of Florida, Tampa Division, and was granted immunity for prosecution pursuant to 18 U.S.C. §§6001, *et seq.*, after asserting his priv-

ilege against self-incrimination in response to the grand jury's questions.[1]

The June, 1981, District Court proceedings were antedated by proceedings involving petitioner's appearance before a predecessor grand jury in the Tampa Division. During the predecessor investigation, petitioner had filed a §3504 motion for disclosure of electronic surveillance in connection with his appearance before the predecessor grand jury. On or about June 16, 1980 — approximately one year before his appearance before the successor grand jury — the government filed its response based on an all-agency records search denying any federal electronic surveillance of petitioner or his premises to the date the response was filed, but not denying state surveillance.

---

[1]The questions asked appellant before the grand jury which he declined to answer are as follows:

"Are you now or have you ever been a member of the Church of Scientology?"

"Are now or have you ever been an employee of the Church of Scientology?"

"What positions of employment have you had with the Church of Scientology, particularly an organization referred to as the Guardian Office?"

"Directing your attention to approximately March of 1976, Mr. Hermann, did you direct Michael Meisner to plan a hit-and-run accident involving Mayor Gabe Cazares during the time in which he would be in Washington in attendance at a Mayors' Conference?"

"Do you have any information concerning the alleged hit-and-run accident that took place in March of 1976 concerning Gabriel Cazares?"

"Mr. Hermann, what does 'FSM' mean to you?"

"What does 'Project Alpine' mean to you?"

"How about 'Project Tacoless'?"

"Have you ever heard of Operation Speedy Gonzales?"

"Do you know Merrell Vannier?"

"Do you know Francine Vannier?"

"Do you know Sharon Thomas?"

See *Testimony of Mitchell Hermann, Re: Church of Scientology* (June 10, 1981), pp. 9-11.

Subsequently, Mr. Hermann was re-subpoenaed, through counsel, and appeared before the successor grand jury. At the same time, he filed a new §3504 motion for disclosure of electronic surveillance.

The earlier §3504 motion had requested denial of electronic surveillance by both federal and relevant state and local authorities. In support of that motion, petitioner had filed a statement of his prior residence and work telephone numbers and addresses, his own and counsel's declaration indicating phone playbacks of conversations related to the case, and extensive documentation of federal and Florida investigations of the Church of Scientology and its members.

The documentation submitted by petitioners in support of his initial request for disclosure of relevant state and local electronic surveillance included, in summary: the fact that the petitioner was a convicted defendant in other federal criminal proceedings against members of the Church, which matter was pending on appeal; the fact that federal prosecutors had indicated that they were communicating and cooperating with current state investigations into Church activities, including in the Tampa area; the fact that there had been a history of federal/state investigations and cooperation into activities of Church members in the Tampa area going back to 1976; and the fact that local officials and press had called on federal and state authorities to undertake criminal investigation of Church members.

When Mr. Hermann appeared before the new grand jury a year later, new information had come to light, which had not been previously available. Mr. Hermann incorporated the files of his previous motion, and also submitted the new information to the District Court. This new information included concrete indications of F.B.I. surveillance of Mr.

Hermann and new information establishing state-federal cooperation in the instant investigation.

Specifically, Mr. Hermann submitted the following new information: (1) In April, 1981, he had received a written response from the government to a request he had made pursuant to the Freedom of Information Act. This response indicated the government had found two "see references" to him in the electronic surveillance records of the Federal Bureau of Investigation's Las Vegas Field Office. (2) The Pinellas/Pasco State Attorney's Office had initiated a state grand jury investigation into the same activities as the federal grand jury was investigating, and had subpoenaed two of the same witnesses as the federal grand jury. And (3) the government disclosed, upon petitioner's inquiry to it before the Court, that on June 10, 1981, the United States Attorney for the Middle District of Florida (Gary Betz) had been in communication with the Pinellas/Pasco State Attorney (James Russell), and had informed him that witnesses whom Mr. Russell was interested in subpoenaing for his investigation were appearing before the federal grand jury. Moreover, it subsequently developed that telephone inquiry was made of the District Judge by the State Attorney's Office concerning the permissibility of serving state grand jury process on some or all of the June 10 witnesses while they were in Tampa attending the U.S. grand jury.

The government's response to the claim of electronic surveillance based upon the newly discovered information was an affidavit from Terrance Bostic, the Assistant U.S. Attorney in charge of the grand jury investigation. Mr. Bostic incorporated the government's response a year earlier denying any federal surveillance up to June 16, 1980. The affidavit also denied any federal electronic surveillance of

appellant since that date in the Middle District of Florida,[2] asserted that Mr. Bostic and the F.B.I. agent in charge were unaware of any surveillance, and stated that the questions asked the witness were based upon witness interviews and documents in the government's possession. It pointedly did not deny surveillance of appellant outside the Middle District of Florida;[3] did not deny surveillance by the Las Vegas Field Office of the F.B.I.; did not deny surveillance of appellant's premises anywhere; and did not deny or otherwise respond to appellant's claim that the questions asked him were tainted by illegal state surveillance. The District Court found the response adequate and held the petitioner in civil contempt of court pursuant to 18 U.S.C. §1826(a) on June 17, 1981.

On appeal to the Fifth Circuit,[4] petitioner Hermann raised that the government's denial of electronic surveillance was inadequate because (1) the information demonstrating that the Las Vegas F.B.I. office had references to him necessitated a specific response on that issue, which the government had failed to provide, (2) the showing below on federal/state cooperation in the investigation required a denial of electronic surveillance by the appropriate state agencies, and (3) the government failed to deny electronic surveillance

---

[2]"On June 17, 1981 I spoke with Supervising Agent Robert Dwyer, Federal Bureau of Investigation, Tampa, Florida, and he stated that no electronic surveillance, legal or otherwise, had been conducted by the Federal Bureau of Investigation *in the Middle District of Florida* concerning any of the witnesses, their attorneys, or the Church of Scientology *since the time the government filed its previous response*." (emphasis supplied).

[3]". . . I am unable to advise the Court whether any electronic surveillance was conducted outside the Middle District of Florida since the time of the Government's previous response . . ."

[4]Under §9(i) of Public Law 96-462, the case remains a Fifth Circuit case although the Middle District of Florida is now in the Eleventh Circuit.

of Mr. Hermann's premises or surveillance outside the District from June, 1980, to June, 1981.

After the filing of Mr. Hermann's brief to the Court of Appeals, the government *for the first time* responded to the information concerning the Las Vegas Field Office's electronic surveillance references to him. In a footnote in its brief, the government stated that on July 4, 1981 (a national holiday), it had made an "appropriate inquiry" to the Las Vegas Field Office, and that "information was received" that the references to Mr. Hermann were references to prior inquiries about the existence of electronic surveillance of him.[5] The footnote was unsworn, and was no more specific than just described concerning who provided this information, what their position was, and how they possessed the knowledge.

Although petitioner pointed out that acceptance of such a denial was contrary to the practice of this Court,[6] and despite his protestation that this was a last minute denial which was both irrelevant to whether Mr. Hermann had had "just cause" to decline to testify and was subject to serious

---

[5]The full footnote read as follows: "On July 14, 1981, appropriate inquiry was made with the Las Vegas field office of the Federal Bureau of Investigation to determine the type and location of references referred to in the subject letter. Information was received that both references were contained in the central indices. The first reference to Mr. Hermann was the inquiry from F.B.I. headquarters to determine if Mr. Hermann had been the subject of electronic surveillance in order that the F.B.I. might respond to the petitioner's previous Gelbard motion. The second reference to Mr. Hermann located in the central indices was the response by the Las Vegas field office to headquarters of the Federal Bureau of Investigation stating that Mr. Hermann had not been the subject of electronic surveillance." (Government's brief, p. 22, n.15)

[6]In *United States v. Egan*, 408 U.S. 41 (1972), the companion case to *United States v. Gelbard*, the government denied electronic surveillance of the witness for the first time before this Court, but the matter was reversed and remanded nonetheless.

questions as to both its reliability and substance,[7] the Fifth Circuit accepted this representation and disposed of the issue by observing that the government had "satisfied" it that F.B.I. field office references to Mr. Hermann were to prior inquiries from prior proceedings. (App., p. 9 n.10)

With respect to the question of denial of surveillance by cooperating state agencies, the Court stated that it was "not prepared to require the federal government to extend the scope of its inquiry . . . to state agencies." (App., pp. 9-10) In a footnote the Circuit implied a test which appears in no other case of which petitioner is aware, *i.e.*, where a "federal agency exercised considerable dominion and control over a state agency's resources in pursuing a federal investigation" (App., p. 10 n.11), denial may be appropriate.

Finally, on the deficiencies in the government's denial for failure to address petitioner's premises or surveillance outside the District, the Court found it "sufficient as an update" of the all-agency response of a year earlier, and indicated that it would otherwise have been insufficient (App., pp. 8-9 & n.10). Hence, the Circuit permitted a denial, concededly inadequate for a full year, to suffice.

---

[7]In his reply brief, Mr. Hermann pointed out that the adequacy of this representation had to be tested in the District Court in the first instance, where he could *and would* present evidence which cast doubt on the accuracy of the representation. He noted that similar references to Mr. Hermann had not appeared in other F.B.I. field offices, which would logically have been the case if such inquiries are indexed, and that the F.B.I. had refused to disclose to Mr. Hermann in his F.B.I. inquiry the contents of the references because it would "interfere with law enforcement proceedings, including pending investigations," a clearly dishonest refusal if the reference was only to a prior inquiry by Mr. Hermann himself. (Appellant's Reply Brief, pp. 14-16).

REASONS FOR GRANTING THE WRIT.

This petition presents to this Court the opportunity to clarify and resolve a range of issues which have been the subject of discussions by various Circuit Courts of Appeals and District Courts ever since this Court ruled that a grand jury witness was entitled to raise a claim of unlawful electronic surveillance in defense to a contempt charge as a recalcitrant witness. *See Gelbard v. United States*, 408 U.S. 41 (1972). These issues include what constitutes a sufficiently supported and precise claim to require a particularized governmental response; the nature and form of a governmental denial of surveillance, including whether it must be sworn; to what extent a denial of surveillance over a year old diminishes the necessary scope of a governmental denial of surveillance; under what circumstances a denial of surveillance by cooperating state agencies is necessary in order to comply with the requirements of 18 U.S.C. §3504; and the proper procedure to be followed where the Government denies surveillance for the first time in the appellate court.

Since this Court's decision in *Gelbard*, the particular rights and obligations of the parties to a grand jury witness §3504 motion have been the subject of dozens, perhaps even hundreds, of cases. This court has not to date considered any of the complex of procedural and substantive problems which have arisen in the wake of *Gelbard*. Yet the state of the law in this area is confused, often contradictory, and unclear, with unfortunate consequences for parties, the courts, and the proper and efficient administration of justice. The record in this case, which is usually exhaustive and raises almost all of the questions which have been troublesome in the application and interpretation of §3504, presents a particularly favorable setting in which to resolve many of these problems. As we discuss at greater length below, the range of issues raised here, the unclear and conflicting state

of the law, and the strong Congressional purpose which underlay the *Gelbard* decision are all factors which militate in favor of the granting of certiorari in this case.

1. The Acceptance of a Hearsay, Unsworn Denial of Electronic Surveillance Submitted for the First Time in the Court of Appeals Is Contrary to the Practice of This Court and Other Courts of Appeals, and Presents an Important Question on the Proper Implementation of 18 U.S.C. §3504.

The most concrete indication of the possibility of electronic surveillance in this case, and one of the strongest ever presented in any recorded case, was the documentation submitted by petitioner to the District Court indicating that the F.B.I.'s Las Vegas Field Office had "see" references to him in its electronic surveillance index. Usually, a witness is able to provide only a "bare claim" of surveillance, unsupported by any specific indications of the likelihood it has occurred, *e.g.*, *In re Brummit*, 613 F.2d 62 (5th Cir. 1980); *United States v. Egan*, 408 U.S. 41 (1972), which is natural since the very purpose and effectiveness of such surveillance depends on secrecy, *e.g.*, *In re Evans*, 452 F.2d 1239, 1248-50 (D.C. Cir. 1971).

Despite this exceptional showing, the opinion below accepted a completely unsworn and hearsay denial, contained in a footnote to the government's brief. This denial, which appeared questionable on its face and on investigation (see n.7, *supra* at p. 9), and which the petitioner never had the opportunity to rebut, is less substantive and reliable than most courts have required. "Many courts have become wary of accepting a government denial in the form of unsworn letters or oral representations," and "[a]lmost all courts now require a government denial, minimally, to be in the form of a sworn affidavit." La Fond, "The Grand Jury

Witness and Electronic Surveillance," *Oregon L. Rev.*, 57:247-288, 264 (1977-78); *see, eg., Korman v. United States,* 486 F.2d 926, 931 (7th Cir. 1973) ("We are of the opinion that an official governmental denial of electronic surveillance must at the very least be submitted in the form of an affidavit by a responsible government official"); *United States v. Alter,* 482 F.2d 1016, 1027 (9th Cir. 1973) (government's denial of electronic surveillance must be in "a responsive factual, unambiguous, and unequivocal affidavit"); *United States v. Smilow,* 472 F.2d 1193 (2d Cir. 1973); *In re Marx,* 451 F.2d 466 (1st Cir. 1971).

Yet here — on the most crucial factual issue before the court, *i.e.*, the significance of the Las Vegas Field Office references to Mr. Hermann — the government was permitted to submit an unsworn statement that the Las Vegas references were to previous inquiries about the existence of surveillance of Mr. Hermann. The circuit's determination that this representation "satisfied" it (App., p. 9, n.10) is a far cry from other courts' discussion of such representations, particularly since the allegation was substantially more than a "bare claim."

Compounding the questionable character of the government's denial was that it was purely hearsay and did not even specify who obtained the information or from whom it was obtained. "A denial of knowledge of illegal wiretapping is obviously worth nothing if the affiant was in a position to know nothing." *In re Quinn,* 525 F.2d 222, 225 n.5 (1st Cir. 1975).

What makes the matter particularly egregious is that this denial — questionable in any event — was presented for the first time at the appellate level and without any opportunity for the petitioner to counter or call into question the government's vague and unsubstantiated representations. This can only have the effect of encouraging such last min-

ute, slap-dash denials on the government's part, directly contrary to the intent of the statute, established procedure, and the witness' right to a meaningful hearing. *See United States v. Alter*, 482 F.2d 1016, 1027 n.19 (witness is "entitled" to "meaningful opportunity" to "test [denial's] legal and factual sufficiency"); *cf., e.g., United States v. Sinor*, 238 F.2d 271 (5th Cir. 1956) (appellate court "can only take the record as it finds it, and cannot add thereto, or go behind, beyond or outside it"); *United States ex rel. McCann v. Adams*, 320 U.S. 222, 221 (1943) (issue of whether habeas corpus petitioner had knowingly and intelligently waived his right to counsel had "never been adjudicated on its merits by the lower courts," and the Court of Appeals improperly dismissed the petition); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard").

Indeed, in the *Gelbard* opinion itself, this Court refused to permit the government to prevail with a last minute denial. *Gelbard's* companion case, *United States v. Egan*, 408 U.S. 41 (1972), involved precisely such an effort, which drew the following response from the Court: "Although, in this court, the government now denies that there was any overhearing, in view of our affirmance that is a matter for the District Court to consider in the first instance." 408 U.S. at 61-62 n.23.

The combination of (1) an unsworn representation, and (2) a representation given for the first time in the appellate court, which we find here, represents a new and greater relaxation of the government's burden that the courts have permitted to date. *Compare, e.g., Korman v. United States*, 486 F.2d 926 (7th Cir. 1973) (letter denial of electronic surveillance submitted in writing for the first time at the appellate level rejected, and matter stayed 30 days to allow government to submit affidavit); *In re Buscaglia*, 518 F.2d

77 (2d Cir. 1975) (government submitted affidavit of denial to appellate court reiterating its previous unsworn representation below, and court commented that "where it is made clear to the appellate court *by affidavit* that there has been no illegal electronic surveillance, such affidavits will be deemed sufficient") (emphasis supplied). And in those instances the denials have not only had to be in affidavit form, but the government had made the same representation to the District Court, where the witness could challenge it, in an unsworn form.

Hence, the procedure permitted below represents a significant departure from the practice of the other Courts of Appeals, from the practice followed by this Court, from established appellate procedure, and from elementary principles of the fair administration of justice. If allowed to stand, it will contribute to substantial confusion concerning the government's obligation to properly deny surveillance, and will undermine this Court's decision in *Gelbard*.

2. The Circumstances Under Which a §3504 Claim Requires Disclosure of State Agency Electronic Surveillance Is an Important Question of Statutory Construction and Federal-State Relations, and the Decision Below Established a New and Confusing Standard in Conflict With the Hitherto Existing Federal and State Law.

A. The Record Below Conclusively Established Federal-State Cooperation in the Investigation.

The record in this case establishes an extraordinary history of governmental investigation into the activities of the Church of Scientology and its members on both a federal and state level. It further establishes a history of federal and state cooperation in these investigations over many years, including specific cooperation on the instant investigation,

which is paralleled by a simultaneous state grand jury investigation into the same activities.

Assistant United States Attorney Raymond Banoun, a member of the Department of Justice in Washington, D.C., and the chief prosecutor in *United States v. Mary Sue Hubbard, et al.*, Crim. No. 78-401 (D.D.C.), a prosecution of members of the Church of Scientology, was quoted as stating that the Tampa federal grand jury investigation was being conducted with state cooperation and participation:[8]

> "Thousands of top secret Church of Scientology documents now in the hands of the federal government will be used in widespread probes of the sect by Internal Revenue Service, prosecutors in several states and grand juries in Tampa and New York, a top U.S. prosecutor said Wednesday . . . 'Our pleadings will show that grand juries in Tampa and New York need the material, that the IRS is conducting intensive investigations and that a number of state prosecutors will use the documents,' Assistant U.S. Attorney Raymond Banoun said in an interview . . .
>
> "Banoun indicated IRS probes might include an examination of the United Churches of Florida group, which seized documents show was created in Clearwater to serve as a Scientology tax shelter . . .
>
> "Banoun also indicated that Pinellas-Pasco State Attorney James Russell is involved in the Tampa grand jury probe of Scientology, but Russell has been unavailable for comment in Clearwater. On Wednesday

---

[8]During this year, there were not only continuing federal and state investigation going on in the Middle District of Florida, but in addition the appeal in *United States v. Hubbard, et al.*, Crim. No. 78-401 (D.D.C.), Nos. 79-2442, 2447-50, 2456, 2459, 2462 (D.C. Cir. Oct. 2, 1981), in which petitioner was a defendant, was pending, and a New York federal grand jury was also conducting inquiries into the activities of members of the Church of Scientology, *see In the Matter of Charles Batdorf, Grand Jury Witness*, No. CR Misc [M11-88] (S.D.N.Y. 1980).

afternoon, Russell called Banoun, but Banoun would not discuss the nature of the call.

"Florida Attorney General Jim Smith might also be conducting an investigation of the alleged Scientology espionage in state agencies, Banoun said."

Clearwater Sun, 11/18/79, pp. 2C, 9A.

The Government also commented on this in its opposition to petition for writ of mandamus in *In re Church of Scientology*, Petitioner, No. 79-2318 (D.C. Cir.), pp. 27-28:

"Furthermore, Grand Jury investigations are pending in the United States District Courts for the Middle District of Florida and the Southern District of New York. The Church of Scientology is well-aware of these investigations, as they were a substantial factor during the plea negotiations in the aforementioned criminal case [*U.S. v. Mary Sue Hubbard, et al.*]. Since the District Court made its findings of guilty, a number of state attorneys general and federal agencies have initiated investigations of the Church and its officials."

Assistant United States Attorney Terrance Bostic admitted at the June 10 hearing in this case that the United States Attorney for the Middle District of Florida (Gary Betz) and the State Attorney for Pinellas-Pasco County (James Russell) had had contact with each other — either direct or through representatives — since the time the subpoenas for petitioner and other witnesses were issued. This communication involved informing Mr. Russell that certain witnesses would be attending the grand jury. Telephone inquiry of the district court was also made by Mr. Russell's office on June 10 as to the permissibility of serving state grand jury process on witnesses while they were attending the United States Grand Jury.

These indications of federal-state cooperation are reinforced by the publicly known fact that the Pinellas-Pasco

State Attorney is conducting an investigation which parallels that of the No. 81-1 Grand Jury. The California Supreme Court has granted a hearing on the legality of an order requiring Francine Vannier and Merrell Vannier, both of whom were subpoenaed and appeared before the grand jury below, to appear before the Florida state grand jury under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. *Merrell and Francine Vannier v. Superior Court of Los Angeles County*, No. LA 31418 (Cal. Sup. Ct., May 13, 1981).

Further, the former Mayor of Clearwater, Florida, Gabriel Cazares, is considered the alleged victim of at least some of the activities under investigation by both the instant Grand Jury and the Pinellas-Pasco County State Attorney. Questions asked of the Vanniers and Mr. Hermann before the federal grand jury inquired of witnesses' knowledge of or contact with Mr. Cazares. In the proceedings to obtain the attendance of Mr. and Mrs. Vannier before the Florida state grand jury described above, an investigator for the Pinellas-Pasco State Attorney's Office (Denis Quilligan) filed an affidavit in support of Material Witness Certificates setting forth *inter alia* that Merrell Vannier joined a Florida law firm in 1977 which was representing Mayor Cazares in litigation with the Church of Scientology and that, without disclosing "his connection to Scientology," Mr. Vannier attempted to have the mayor "drop the case and apologize."[9]

In addition, the years long history of federal-state cooperation in other investigations of the Church were documented:

---

[9]All of the above quotations and facts were documented in the record below, as were any others referred to in this petition.

— In 1976, the Bureau of Alcohol, Tobacco and Firearms, Tampa United States Attorneys Office, U.S. Customs Bureau, Dunedin, Florida Police Department, and the Pinellas-Pasco State Attorney's Office all communicated and cooperated with each other in investigating charges of a weapons importation violation by members of the Church of Scientology within the Middle District of Florida.[10]

— In 1976, the Federal Bureau of Investigation, Tampa United States Attorneys office, Pinellas-Pasco County State Attorneys Office, and the Florida Attorney General's Office communicated and cooperated with each other regarding an investigation into the Church of Scientology's purchase of the Fort Harrison Hotel in Clearwater, Florida.[11]

— In 1979 and 1980, the City of Clearwater, Florida, and its officials had extensive contact with federal legislative and law enforcement bodies requesting federal investigation, both criminal and legislative, of the activities of the Church of Scientology and its members.

— From 1976 through the present, former Clearwater Mayor Gabriel Cazares had extensive contact with both federal and state governmental officials and agencies seeking active investigation into the activities of the Church of Scientology and its members.

---

[10]The documentation shows the Dunedin, Florida Police Department turned over information to the U.S. Bureau of Alcohol, Tobacco and Firearms, which in turn brought the matter to the attention of the Tampa U.S. Attorney's Office. After that Office declined to prosecute, it turned over information concerning the investigation to State Attorney James Russell's office. The letter dated October 4, 1976 from the U.S. Attorney's Office to the State Attorney's Office, explaining the information would be forwarded, concluded, "I trust the above actions will enable you to complete the investigation contemplated by your office. If you need additional assistance, please feel free to contact this office."

[11]One of the documents, from the Tampa, Florida, F.B.I. dated April 6, 1976, indicates the F.B.I. was in contact with the State Attorney's Office to determine the state of the local investigation.

— For many years, the local area press had clamored for both state and federal investigations into the activities of the Church of Scientology and its members.

B. The Decision Below Established a New and Confusing Standard in Conflict With Current Federal and State Law.

18 U.S.C. §3504, and the statute to which it is a procedural complement, 18 U.S.C. §§2510-20, have been consistently interpreted to apply to both the federal and state governments.[12] The decision below, that a denial by participating state agencies is required, if at all, only where "a federal agency exercised considerable dominion and control over a state agency's resources in pursuing a federal investigation" (App., p. 10 n.11) is contrary to the weight of authority discussing the issue. *See, e.g., In re Harris*, 383 F.Supp. 1036, 1039 (N.D. Cal. 1974) (to require response regarding state surveillance, witness must make "credible connection" between state agency and federal investigation); *Santangelo v. People of the State of New York*, 374 N.Y.S.2d ... (1975), revs'd on other grounds, 381 N.Y.S.2d 472 (1975) (where federal authorities played acknowledged knowledged role in state investigation, state prosecutor must make inquiry of federal authorities); *Cruz v. Alexander*, 477 F.Supp. 516 (1979) and 509 F.Supp. 640 (S.D.N.Y. 1980)

---

[12]Although §3504 does not explicitly refer to the states, the courts addressing the issue have generally assumed that it applies either directly or indirectly to the states. *See Cruz v. Alexander*, 477 F.Supp. 516 *appeal disms'd mem.*, 622 F.2d 573 (2d Cir. 1980) and 509 F.Supp. 640 (S.D.N.Y. 1980); *People v. Cruz*, 357 N.Y.S.2d 709 (1974); *cf., State v. Chaitkin*, 135 N.J. Super. 179 (Essex County Ct. Law Div. 1975) (although §3504 does not explicitly apply to state proceedings, some equivalent of it must be utilized). Here, however, whether §3504 applies to the states is a side issue because we are dealing with federal proceeedings. The obligation of federal authorities to make inquiry of state authorities in order to provide an adequate denial of surveillance under §3504 does not depend on whether §3504 applies independently to the states.

(person convicted of New York State offense granted petition for habeas corpus where federal court ordered state prosecutors to deny federal electronic surveillance, which they failed to do satisfactorily; court order was for denial of surveillance by any "federal, state or local agency . . . if there is reason to believe they may have been involved"); *Vandeyacht v. United States*, No. 75-3290 (9th Cir. 11/24/75) (reversing grand jury witness contempt because, *inter alia*, the government's §3504 denial did "not deny surveillance by state agencies").

The decision below also conflicts with the discussion by other circuit and district courts of when participating federal agency denials are necessary in response to a §3504 motion. Although these cases refer to federal rather than state agencies, the distinction is without significance in this context because of the statutory scheme's explicit application to both federal and state proceedings. *See In re Quinn*, 525 F.2d 222 (1st Cir. 1975) (investigation with "international overtones . . . could reasonably have engaged the attention of other agencies . . . and such other agencies might to some degree have fueled the present inquiry," thus requiring inquiry of other agencies for adequate denial of surveillance); *United States v. Weiner*, 418 F.Supp. 941, 944 (M.D. Pa. 1976) (Patty Hearst case aroused such unusual nationwide interest and concern that it was more likely than in the "usual case" that there was other agency participation and that there was electronic surveillance, thus requiring a governmental denial which is "more dispositive of electronic surveillance than in less extraordinary case").

Hence, an apparently new and extraordinary standard has been created for establishing the necessity of a denial of state surveillance. Indeed, absent such a standard, it is clear that the exceptional showing below — demonstrating a long history of investigation by both state and federal agencies,

cooperation between state and federal agencies on this and other Church of Scientology related investigations, and a virtually unique degree of public interest and notoriety in the area — would have been sufficient to require a response. This issue is of great public importance given the federal-state statutory scheme, the current concern to maintain and develop the proper federal-state relationship, and the historic vigilance of the courts against abuse of the federal-state inter-action to avoid otherwise required standards, *cf.*, *Elkins v. United States*, 364 U.S. 206 (1960).

If this Court fails to grant certiorari in this case, it will leave the whole federal-state balance in the area of electronic surveillance in a state of increased confusion. Congress passed 18 U.S.C. §§2510-20 in 1968, and made the decision that this issue was of such widespread importance that it would apply the act to the states as well as the federal government. Yet there is no definitive opinion addressing the interpretation of the statute in this respect, or clarifying the obligations of a party, the government, or the courts, and this Court has never addressed state obligations under §§2510-20 and §3504. The granting of certiorari here will permit the resolution of questions which are vital to the proper administration of justice.

3. The Holding Below That the Government's Failure to Deny Electronic Surveillance of the Witness' Premises, or Any Surveillance Outside the District, Conflicts With Other Circuit Decisions and With the Decisions of This Court.

The Court below, although recognizing that the government's failure to deny any surveillance of the witness' premises would be a fatal deficiency, found that the government's denial was adequate because it was a supplement to the all-

agency denial filed a full year earlier. (The earlier response had denied surveillance of the petitioner's premises.)

Initially it should be noted that the petitioner had resided outside of the Middle District of Florida for the whole year prior to his appearance, and that there were pending proceedings and investigations in other districts concerning members of the Church during that period. The Circuit's decision is contradicted by substantial authority setting forth the standards for an appropriate denial of a witness' premises, including this Court's decision in *Alderman v. United States*, 394 U.S. 165 (1969).

The reach of the Constitution and 18 U.S.C. §§2510-20 to the premises of an aggrieved party is so well known that it hardly requires citation. In *Alderman*, this Court defined standing to object to unlawful electronic surveillance to reach the "petitioner himself or conversations occurring on his premises." 394 U.S. at 176. *Accord, e.g., United States v. Cruz*, 594 F.2d 268 (1st Cir. 1979); *United States v. Scafide*, 564 F.2d 633 (2d Cir. 1977); *United States v. Ahmad*, 347 F.Supp. 912, 933 (M.D. Pa. 1972) ("aggrieved person" under §2510(11) is "synonymous" with this Court's discussion in *Alderman* "conferring standing upon one whose premises are the subject of electronic surveillance").

This standard has equally been applied in the grand jury witness setting so commonly that the cases reflect that the government has consistently included premises in its denials, thus obviating the necessity of litigating the issue. *E.g., Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972); *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973).

In these proceedings, however, the government made no such representation because its denial was limited to the Middle District of Florida, and the witness resided outside

the district. The decision below, recognizing the inadequacy of the response, in essence bootstrapped a one year old denial in order to avoid the logical consequences of the court's own realization of the insufficiency of the government's representation. The result is the substantial evisceration of this Court's decisions in *Alderman & Gelbard*, and an open ended invitation to abrogate the witness' right to a proper and reliable governmental denial of surveillance. As with the other issues we have raised in this petition, this matter demands clarification and uniformity if there is to be consistency in the handling of these matters in the lower courts.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Dated: December 10, 1981.

Respectfully submitted,

BARRETT S. LITT,

BENNIE LAZZARA, JR.,

Counsel for Petitioner.

APPENDIX.

In the United States Court of Appeals for the Fifth Circuit* Unit B.

In re: Grand Jury Proceedings, Mitchell Hermann, Witness, Appellant. No. 81-5602.

In re: Grand Jury Proceedings, Francine Vannier, Appellant. No. 81-5636.

Appeal from the United States District Court for the Middle District of Florida (November 10, 1981).

Before Hill, Fay and Anderson, Circuit Judges.

These consolidated appeals arise in the context of civil contempt convictions of two grand jury witnesses, Mitchell Hermann and Francine Vannier, who refused to answer questions before a federal grand jury. Before turning to the issues presented, we first review the facts leading to the convictions from which appeal is taken.

The grand jury before which witnesses Hermann and Vannier were subpoenaed to appear, sitting in the Tampa Division of the Middle District of Florida, is investigating allegations that members and employees of the Church of Scientology conspired and undertook to harass and silence critics of the church in central Florida.[1] In February 1980

---

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

[1]Specifically, Scientologists allegedly planned:

(1) To discredit the congressional campaign of Gabriel Cazares, a former mayor of Clearwater, Florida who vociferously opposes the church, by

(a) staging a fake hit and run accident in Washington, D.C. which would compromise Cazares' reputation;

(b) framing Cazares with bigamy by bribery and falsification of records;

(c) infiltrating and undermining his campaign; and

(d) causing Cazares to retain a lawyer to represent him in litigation against the Church of Scientology who, unknown to Cazares, was a Scientologist;

(footnote continued on following page)

witness Hermann had been subpoenaed to testify before a predecessor grand jury investigating the same allegations. After asserting his fifth amendment privilege against self-incrimination, Hermann was granted use immunity and ordered by the district court to testify.[2] In spite of this order Hermann again refused to answer the questions propounded to him before the grand jury, this time alleging that the questions were the product of illegal electronic surveillance,[3] and moved pursuant to 18 U.S.C. § 3504[4] for dis-

---

(2) To discredit another church critic, the St. Petersburg Times, by

(a) having a Scientologist pose as a messenger for organized crime and deliver an apparent bribe to a reporter; and

(b) infiltrating a law firm representing the Times in litigation against the church, and thereby stealing confidential legal files relating to that litigation.

The federal statutes allegedly violated by those Scientologists accused of engaging in such activities include 18 U.S.C. §§ 371 (conspiracy to commit an offense or to defraud the United States), 1341 (frauds and swindles), and 1952 (interstate and foreign travel and transportation in aid of racketeering enterprises).

[2]The government apparently petitioned the district court for an order compelling Hermann to testify before the grand jury without invoking the fifth amendment privilege. *See* 18 U.S.C. §§ 6001 *et seq.* (1976). Section 6002 provides in part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> . . . .
>
> And the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

[3]Hermann was asserting his right under 18 U.S.C. § 2515 to have excluded any evidence derived from illegal interception of wire or oral communications. That statute provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . of the United States, if the disclosure of that information would be in violation of this chapter.

[4]Section 3504 provides in pertinent part:

> (a) In any proceeding in or before any grand jury, of the United States—

closure by the government of any electronic surveillance of him or his premises. In support of his motion, Hermann submitted both his own and his lawyer's statements disclosing their belief that their telephone conversations had been intercepted and documentation evidencing federal and Florida investigations of the Church of Scientology.

On June 16, 1980, the government filed its statutorily required response to Hermann's § 3504 motion. In it the government stated that the FBI had searched its records pertaining to electronic surveillance (to the extent the records had been indexed) and had not located anything indicating that Hermann or his lawyer had been monitored. Record searches by all potentially interested federal agencies[5] likewise disclosed no relevant evidence. The district court accepted the government's response as adequate under § 3504. Unfortunately, the life of the grand jury had expired

---

> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> . . . .
>
> (b) As used in this section "unlawful act" means any act or use of any electronic, mechanical, or other device (as defined in Section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

This section provides the means for demonstrating illegal electronic surveillance and therefore for enforcing a witness' § 2515 rights.

[5]Those agencies included the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, United States Customs Service, United States Postal Service, the United States Secret Service, the Internal Revenue Service, the Central Intelligence Agency, the National Security Agency, the Department of Defense, and the Immigration and Naturalization Service.

before the district court reached the merits of the government's motion to hold Hermann in contempt.

Consequently, the government subpoenaed Hermann to appear on June 10, 1981 before the federal grand jury which succeeded the grand jury before which Hermann had already appeared. Hermann again was offered immunity under 18 U.S.C. § 6002, but again he refused to testify, filing a § 3504 motion.[6] In support of this second § 3504 motion, Hermann submitted a letter in which the FBI admitted that it found two relevant "see" references in its Las Vegas indices, both his own and his lawyer's affidavits indicating their belief that their conversations were being intercepted, and more documentation evidencing parallel state and federal investigations of the church. In response the government again denied any relevant electronic surveillance prior to June 16, 1980, but as to the time period since then, the government swore only that it had checked with the FBI agent in Tampa supervising the investigation of the church

---

[6]The questions which Hermann refused to answer were:

"Are you now or have you ever been a member of the Church of Scientology?"

"Are you now or have you ever been an employee of the Church of Scientology?"

"What positions of employment have you had with the Church of Scientology, particularly an organization referred to as the Guardian Office?"

"Directing your attention to approximately March of 1976, Mr. Hermann, did you direct Michael Meisner to plan a hit-and-run accident involving Mayor Gabe Cazares during the time in which he would be in Washington in attendance at a Mayor's Conference?"

"Do you have any information concerning the alleged hit-and-run accident that took place in March of 1976 concerning Gabriel Cazares?"

"Mr. Hermann what does 'FSM' mean to you?"

"How about 'Project Tacoless'?"

"Have you ever heard of Operation Speedy Gonzales?"

"Do you know Merill [sic] Vannier?"

"Do you know Francine Vannier?"

"Do you know Sharon Thomas?"

who stated that no surveillance of Hermann had been conducted in the Middle District of Florida or, to his knowledge, anywhere else. The government did not deny that it had monitored Hermann's premises (Hermann lives outside Florida); nor did it respond at all to Hermann's claim that the government cooperated with the state of Florida in monitoring him. The sworn response did state that the questions sought to be asked were based solely upon information derived from interviews of other witnesses and from documents seized from the Church of Scientology, and denied that the questions were in any way derived from any electronic surveillance. Holding the government's response adequate, the district court adjudged Hermann in contempt.

On June 10, 1981 witness Francine Vannier also appeared under subpoena before the federal grand jury sitting in Tampa. She also asserted her fifth amendment privilege.[7] The government petitioned under 18 U.S.C. §§ 6001 *et seq.* for an order compelling her to testify under a grant of use immunity, and the district court so ordered. Like Mr. Hermann, however, Mrs. Vannier also persisted in her refusal to testify, claiming illegal surveillance by the government and a privilege against adverse spousal testimony. The premise of Mrs. Vannier's assertion of spousal privilege

---

[7]The questions which Vannier refused to answer were:

"Mrs. Vannier, have you ever lived in Pinellas County, Florida?"

"Are you now or have you ever been a member of the Church of Scientology?"

"Are you now or have you ever been employed by the Church of Scientology?"

"Do you know an individual by the name of Gabriel Cazares?"

"Did you work in the congressional election campaign of Gabe Cazares?"

"If you worked in the election campaign of Gabe Cazares, were you doing so at the instructions of the Church of Scientology?"

"Were you sent to Pinellas County, Florida as an undercover operator for an FSM to work upon the campaign committee of Gabriel Cazares?"

was her belief that her answers to the questions propounded would tend to incriminate her husband. In response to the district court's order to show cause why she should not be held in contempt, Mrs. Vannier joined with Mr. Hermann in moving under § 3504 for disclosure of illegal interception. Filing a single response to Hermann and Vannier's joint motion, the government simply referred to both movants generally in answering the motion. However, as this response covered only the time since the response to Hermann's first motion, the government submitted no denial of federal electronic surveillance of Vannier prior to June 16, 1980. In court the government acknowledged this defect in its response and assured the court that a supplemental affidavit would be submitted. Apparently relying on this, the district court ruled the response to Mrs. Vannier's motion adequate. The government, however, has not supplied a supplemental response. The court further ruled that the spousal privilege was inapplicable on the ground that the answers to the questions would not incriminate her husband and held Mrs. Vannier in contempt.

These consolidated appeals present this court with two issues: (1) whether the government's response to the § 3504 motions is adequate, despite (a) no denial of electronic surveillance outside the Middle District of Florida since June 16, 1980; (b) no denial of electronic surveillance of appellants' premises; (c) no response at all to the claim that the subpoena and questions were the product of state and federal cooperation in an investigation of the church; and (d) in Vannier's case, no response at all concerning electronic surveillance prior to June 16, 1980; and (2) whether Vannier's allegation that her answers to these questions would tend to incriminate her husband constitutes just cause to refuse to testify?

With respect to Mr. Hermann, we hold that the government's response was adequate and affirm his contempt conviction. As to Mrs. Vannier, we conclude that she did not adequately raise a claim under § 3504 so as to require a government response. Furthermore, her claim of a privilege against adverse spousal testimony is meritorious with respect to only two of the questions which she refused to answer. With this modification, her contempt conviction is also affirmed.

I. Adequacy of the Government's Responses

A. Response to Hermann's Motion

Under 18 U.S.C. § 1826(a) the district court may confine a recalcitrant grand jury witness if the witness' refusal to testify is without "just cause." However, 18 U.S.C. § 2515 provides a defense to a contempt charge; a grand jury witness may decline to answer questions derived from illegal interception of the witness' communications. In short, a showing that the interrogation would be based upon the illegal interception of the witness' communications consitutes a showing of "just cause" that precludes a finding of contempt. *Gelbard v. United States*, 408 U.S. 41, 47-50 (1972).

Section 3504 provides a mechanism by which a potential witness may try to demonstrate that the questions posed were derived from illegal electronic surveillance. "[U]pon a claim . . . that evidence is inadmissible because it is the primary product of [illegal interception] . . ., the opponent of the claim shall affirm or deny the occurrence of the alleged" illegal surveillance. 18 U.S.C. § 3504 (1976). In this circuit the adequacy of the government's denial of illegal electronic surveillance is dependent upon the specificity of

the witness' allegation of illegality. *In re Grand Jury Proceedings*, 643 F.2d 226, 229 (5th Cir. 1981); *United States v. Brummit*, 613 F.2d 62, 65 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *United States v. Stevens*, 510 F.2d 1101, 1105 (5th Cir. 1975). Hermann does not argue, and indeed could not argue, that the government's response to his first § 3504 motion was inadequate. A record search by all potentially interested federal agencies which revealed no electronic surveillance of the movant or his attorney is a valid denial. In light of this prior all agency inquiry and response, we hold that the government's response to Hermann's second § 3504 motion was sufficient *as an update* of its first June 16, 1980 response. Were the government's second response the sole reply ever made to a claim by Hermann of illegal interception, we could not pronounce it sufficient.

That, however, is not the situation with which we are confronted. Here the government has already made a full inquiry in order to respond to Hermann's claims. Although we are cognizant of the importance of § 3504 as a means of enforcing a witness' right to decline to answer questions based on illegal interception and of the government's statutory burden to affirm or deny, we also are aware of the enormous potential inherent in a § 3504 motion for deliberate delay and hindrance of grand jury proceedings by a recalcitrant witness. As we observed in *United States v. Stevens*, 510 F.2d at 1105-06, "§ 3504 was never intended to permit a witness to thwart the progress of grand jury proceedings." In light of the government's prior response, requiring the government to respond more fully than it has to Hermann's second § 3504 motion would only enhance the utility of § 3504 as a weapon for frustrating legitimate grand jury investigations. Were we to impose such a requirement, a witness could request repeatedly a complete,

full agency update, thus indefinitely postponing the investigtion.[8]

Evaluating the government's second reply *as a supplemental response*, we conclude that it is a sufficient denial of illegal interception. In a sworn affidavit, a knowledgeable Assistant U.S. Attorney in charge of the grand jury investigation denied knowledge of any electronic surveillance of Hermann or his attorney outside the Middle District of Florida and denied categorically that any of the questions to be asked of Hermann was derived from illegal interception.[9] Viewed in the context of a prior denial of electronic surveillance based on an all agency record check, this reply is a sufficient denial of Hermann's claim of illegal electronic surveillance of him or his attorney and his premises.[10]

Hermann has also alleged that the government's failure to deny that the questions were the product of illegal electronic surveillance by cooperating state agencies justified his refusal to testify. We are not prepared to require the federal government to extend the scope of its inquiry and

---

[8]Hermann's case illustrates well this obstructive potential. The life of the grand jury before which Hermann was first subpoenaed to appear expired during the course of the district court's hearing and disposition of Hermann's first § 3504 claim.

[9]We refuse to construe the government's response that it had "no knowledge" of surveillance outside the Middle District of Florida as a negative pregnant. The prior full agency inquiry and denial plus the categorical denial that any questions are the product of illegal surveillance suffice to remove the disingenuous import Hermann would have us assign to it.

[10]Again, we wish to emphasize that the failure to deny illegal electronic surveillance of a witness' premises would be fatal were this the government's initial response to a § 3504 motion.

As to the two "see" references to Hermann's name in the FBI's Las Vegas indices, the government has satisfied us that these references were the result of an inquiry from FBI headquarters to the Las Vegas office to determine if Mr. Hermann had been the subject of electronic surveillance and the Las Vegas office's response to that inquiry when the government was making the necessary record search to respond to Mr. Hermann's first § 3504 motion.

its required affirmance or denial to state agencies.[11] Moreover, the government's direct and unequivocal denial that any of its questions were derived from any illegal surveillance—state or federal—is a sufficient answer to Hermann's claim. *In re Harris*, 383 F. Supp. 1036, 1039-40 (N.D. Cal. 1974).

B. Response to Vannier's Motion

As we observed above, the standard for determining the sufficiency of the government's denial of electronic surveillance varies with the degree of specificity of the allegations raised in a § 3504 motion to compel disclosure. *In re Grand Jury Proceedings*, 643 F.2d 226, 229 (5th Cir. 1981); *United States v. Brummit*, 613 F.2d 62, 65 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *United States v. Stevens*, 510 F.2d 1101, 1105 (5th Cir. 1975). Furthermore, this court has stated that

> a "mere assertion" of unlawful surveillance is enough to trigger the government's obligation to affirm or deny. *However, such an "assertion" must be, at a minimum, a positive statement that unlawful surveillance has taken place. A generalized motion based on the possibility of such surveillance . . . is not a "claim"* within the meaning of 18 U.S.C. § 3504(a)(1).

United States v. Tucker, 526 F.2d 279, 282 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976) (emphasis added). In *Tucker* we held that the movants' allegation that "the Government *may* have conducted illegal electronic surveillance" of them or their attorneys was insufficient to state a § 3504 claim and therefore required no response from the government.

---

[11] We do not comment upon the federal government's obligation where it is shown that a federal agency exercised considerable dominion and control over a state agency's resources in pursuing a federal investigation. *See generally, In re Harris*, 383 F. Supp. 1036, 1039 (N.D. Cal. 1974). We do not find such circumstances present here.

As in *Tucker*, we hold here that Mrs. Vannier has failed to state a "claim" of illegal electronic surveillance and that the government, therefore, had no obligation to respond.

While *Tucker* implies that a general assertion warrants a general response, it also makes clear that such an assertion must be a *positive statement* of unlawful surveillance. The only "statement" made by Mrs. Vannier regarding surveillance was her refusal to answer each question asked of her on the ground that the question was "the product of unlawful surveillance." Such an oral objection during testimony is not tantamount to a "claim" for § 3504 purposes. Moreover, although Mrs. Vannier joined Mr. Hermann's motion to compel disclosure, that motion by itself does not contain any positive statement that Mrs. Vannier, her attorney, or her premises were the subject of unlawful surveillance. The motion contains only enumerated requests for disclosure. Mrs. Vannier did not submit, as did Mr. Hermann an affidavit containing positive assertions of illegal interception. Accordingly, we find entirely meritless Mrs. Vannier's request for reversal of her contempt conviction on the ground that the government's response to her suggestion of surveillance was inadequate.

II. Privilege Against Adverse Spousal Testimony

Mrs. Vannier relies upon the spousal privilege as an alternative ground for attacking her contempt conviction. She asserts that the scope of protection afforded by this privilege is coextensive with that of the fifth amendment to the United States Constitution. According to this equation, anything which might tend to incriminate the spouse may be deemed privileged, to the same degree as it would were the fifth amendment protection against self-incrimination applicable. However, Mrs. Vannier fails to offer any persuasive precedent or policy reasons in favor of such a rigorous standard;

nor, it seems, does such support exist. To the contrary, at least one case has suggested that these two privileges are indeed *not* of the same magnitude or scope:

> The privilege has not ordinarily been construed to allow one spouse to decline to testify merely because the testimony may incrimate [sic] the other. Wigmore, *supra* at 231, n.2.

United States v. Snoonian, 502 F.2d 110, 112 (1st Cir. 1974).

Invocation of any privilege obviously works to exclude from the jury's or the court's consideration what otherwise might be admissible evidence:

> Privileges are impediments to the search for truth, finding their justification in the priority of societal values they serve. The higher-than-truth value served by the [spousal] privilege . . . is the protection of the marital bond.

United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979).

The different purposes and social values fostered by the privilege against self-incrimination and the spousal privilege support a distinction in the scope of protection afforded each. While the privilege against self-incrimination, guaranteed by the Constitution in the Bill of Rights, is virtually an absolute, the spousal privilege clearly is not:

> The scope of the marital privilege has never been construed, even at common law, as absolute. *Wigmore, supra*. And as it is in derogation of the public's "right to every man's evidence", *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950), it is not to be "expansively construed."

United States v. Snoonian, 502 F.2d at 112-113.

Applicability of the marital privilege is determined on a case by case basis, after a careful balancing of the public's need for disclosure on the one hand against the need to

protect the marital relationship on the other.[12] The disfavor into which the marital privilege has fallen, largely because of rejection of the archaic notion of the unity of husband and wife, is in stark contrast to the unwavering, constitutionally-protected right of the individual against self-incrimination. Wigmore offers a further reason for the limitation of the spousal privilege:

> [T]he exclusion of a wife on the ground that her testimony may reveal his misconduct, and thus "tend" to charge him, rests on the assumption, false to fact, that her testimony on the stand would in any sense be a revelation, an unsealing of that which was secret. Nothing prevents her from revealing her knowledge out of court; in most instances she has in fact done so. It would be mere hypocrisy to sanction her silence on the stand on the pretext that the husband was thus really safeguarded from her disclosure.

8 Wigmore on Evidence § 2234 at 231-232 (McNaughton rev. 1961).

On the basis of the above, we reject Mrs. Vannier's assertion that the marital privilege is coextensive with the constitutional privilege against self-incrimination, and adopt, instead, its narrow application here. It does not appear to the court that the Vanniers' marriage could be jeopardized or that Mr. Vannier's guilt could be indicated in any way by Mrs. Vannier's answering objective questions containing no reference to her husband. Questions as to whether she resided in Pinellas County; whether she is a member of the

---

[12]According to Rule 501 of the Federal Rules of Evidence,

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Church of Scientology: whether she was ever employed by the Church; and whether she knows Cazares or worked in his election campaign, appear entirely innocuous, neither calculated to, nor capable of incriminating her husband.

The court concedes that answers to the last two questions[13] regarding whether Mrs. Vannier worked in the Cazares campaign at the instruction of the Church of Scientology and whether she was sent to Pinellas County as an undercover operator to work on Cazares' campaign committee might reflect negatively on her husband's innocence. For that reason, we hereby strike Mrs. Vannier's contempt conviction as to those latter questions only, on the grounds of spousal privilege. In doing so, the court rejects a sweeping application of the privilege to the five preceding questions. In *United States v. Brown*, 605 F.2d 389 (8th Cir. 1979), the court reached the same conclusion when it refused to apply the marital privilege to objective questioning.

> Mrs. Clincy's testimony concerning events prior to her marriage was limited to her meeting Clincy and her forming and operating Knox Enterprises with him for a short time prior to May 16, 1978. *Nothing in that testimony reflected illegal activity of any kind on the part of anyone*. The sole testimony of Mrs. Clincy about events after her May 16th marriage to Clincy, and touching Clincy in any way was her statement that he left her within two weeks after the marriage and that she had not seen him since. Her entire remaining testimony about events after her marriage concerned only herself, *i.e.*, statements that signatures on various checks were not her signature.
>
> Clincy was totally unharmed by his wife's testimony. We conclude, moreover, that the marital privilege itself

---

[13]See the list of seven questions asked of Mrs. Vannier in note 7 *supra*.

> went unscathed in this case. The privilege is not absolute.

605 F.2d at 396 (emphasis added).

Similarly, in *United States v. George*, 444 F.2d 310 (6th Cir. 1977), a husband's claim of marital privilege was rejected where his spouse was not the focus of the investigation and where the question "did not relate to his wife nor to any communication with her." 444 F.2d at 314. Although Mr. Vannier clearly is a target here, thus creating a distinction between the present situation and that in *George*, nevertheless the objective nature of the questions was a significant and persuasive factor in the *George* decision, as the court recognizes it to be in the present case.

For the foregoing reasons, the court affirms Mrs. Vannier's civil contempt conviction, except as to her failure to respond to the last two questions asked of her at the grand jury hearing.

No. 81-5602 IN RE: GRAND JURY PROCEEDINGS, MITCHELL HERMANN, Witness, Appellant; 81-5636 IN RE: GRAND JURY PROCEEDINGS, FRANCINE VANNIER, Appellant.

HILL, Circuit Judge, CONCURRING in part and DISSENTING in part:

I concur fully in the affirmance of the contempt conviction of Mr. Hermann on the ground of the adequacy of the government's response to his claim of illegal surveillance. I would reverse, however, Mrs. Vannier's conviction and uphold her claim of privilege against adverse spousal testimony.

My disagreement centers on the court's analysis of the privilege against adverse spousal testimony. The majority fails to appreciate the peculiar effect that the probable conspiracy indictment has upon any invocation of that privilege. It is under the peculiar circumstances of a conspiracy involving both husband and wife that I would agree with appellant Vannier that the privileges against adverse spousal testimony and against self-incrimination are coextensive.

Subject to sharp criticism for its basis in outdated notions which regarded the woman as a chattel and denied her a separate legal existence, the privilege against adverse spousal testimony has had a checkered history.[1] Recently the United States Supreme Court modified the privilege "so that the witness spouse alone has a privilege to refuse to testify adversely" and "may be neither compelled to nor foreclosed from testifying." *Trammel v. United States*, 445 U.S. 40, 53 (1980). *See also* Fed. R. Evid. 501 (applicable to grand juries under Fed. R. Evid. 1101(d)). As an unwilling witness, Mrs. Vannier may not be compelled to

---

[1] *See generally Trammel v. United States*, 445 U.S. 40, 43-50 (1980).

testify if in fact the testimony would be adverse to her husband's interest. Thus the issue becomes whether Mrs. Vannier's answers to the questions posed[2] would tend to incriminate her husband.

In *Blau v. United States*, 340 U.S. 159 (1950), a case involving the fifth amendment privilege against self-incrimination, the Supreme Court noted that the danger of incrimination must not be viewed narrowly. Such a danger may exist, said the Court, even if the answer to a question would not by itself support a conviction. It suffices if the "[a]nswers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of the petitioner." *Id.* at 161. In *Hoffman v. United States*, 341 U.S. 479 (1951), the Supreme Court further elaborated on the standard governing incriminating statements:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. . . . To sustain the privilege, it need only be evident from the implications of the question, *in the setting in which it is asked*, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486 (citations omitted) (emphasis added). Therefore a claim of incrimination must be upheld unless it is perfectly clear that the answers to the questions could not possibly incriminate. *Id.* at 488. The setting in which the questions here were asked—a grand jury investigation of, *inter alia*,

---

[2]*See* note 7 *supra*.

a conspiracy charge[3] involving Vannier's husband—becomes crucial to a proper resolution of a claim of privilege against self-incrimination and against adverse spousal testimony.

The government does not dispute that Mrs. Vannier's husband, Merrill Vannier, is one of the subjects or targets of the federal grand jury's investigation. Allegations concerning Mr. Vannier include claims that he is a member of the Church of Scientology who participated in the unlawful campaign to harass, discredit and silence organizations critical of the church. More specifically, the government believes that Merrill Vannier was the attorney who, as an undercover operative for the church, sought to and did represent Gabriel Cazares in his litigation with the church and breached the attorney-client relationship with Cazares by disclosing confidential communications to the church and its attorneys. Along with witnesses Hermann and Mrs. Vannier, Mr. Vannier was subpoenaed to appear before the federal grand jury in the Middle District of Florida on June 10, 1981. Mr. Vannier asserted his fifth amendment privilege against self-incrimination in response to the questions posed to him.[4] Significantly, the government did not offer

---

[3]See note 1 *supra*.

[4]These questions included the following:

"Are you now or have you ever been a member of the Church of Scientology?"

"Have you ever held an office in the Church of Scientology?"

"In fall 1975, 1976, and 1977 did you ever reside in Pinellas County?"

"Have you ever attended or graduated from any law school in the United States?"

"What state bars are you a member of? Aren't you a member of the Florida Bar?"

"In 1975, when you flew to Florida, did you come with your wife?"

"Do you know Gabriel Cazares?"

"Did you ever have an attorney-client relationship with Gabe Cazares?"

"Were you ever employed in Pinellas or Hillsborough Counties as an attorney?"

"Did you ever obtain or seek a job with James Russell of the State Attorney's Office?"

"Do you know Mitch Hermann?"

Mr. Vannier use immunity in order to compel his testimony. This omission reinforces any suspicion that the government plans to indict Mr. Vannier.

With this setting in mind, it becomes clear that the questions posed to Mrs. Vannier were not "innocuous," as the government contends and the majority agrees, but contain potential for providing a link in a chain of evidence which might be used to convict Mr. Vannier. Under the law of conspiracy, the acts of one co-conspirator in furtherance of the unlawful agreement are admissible against all, even in the absence of the other's approval of these overt acts. *United States v. Netterville*, 553 F.2d 903, 912 (5th Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978). The overt act itself need not be criminal if it is in furtherance of the unlawful agreement, *United States v. Enstam*, 622 F.2d 857, 867 (5th Cir. 1980), and it may occur before or after the others join the conspiracy. *United States v. Netterville*, 573 F.2d at 912. If, for example, Mrs. Vannier were to testify that she moved from California to Pinellas County, Florida with her husband in 1975, and the government proves that the purpose of the move was to engage in, as a field service member of the Church of Scientology, any of the alleged unlawful activities recited in footnote 1, this overt act would provide evidence admissible against Mr. Vannier as an alleged co-conspirator. Likewise, an affirmative answer by Mrs. Vannier that she infiltrated the election campaign of Gabriel Cazares would prove an act attributable to Mr. Vannier. This brief discussion suffices to show that, given the scope of the grand jury's investigation into activities of members and employees of the Church of Scientology, it is not perfectly clear that the answers to the questions could not possibly incriminate Mr. Vannier. *United States v. Hoffman*, 341 U.S. at 488.

This possibility of incrimination, which arises by virtue of the fact that a conspiracy is at issue, convinces me that Mrs. Vannier's claim of privilege should be upheld. The majority apparently concedes that Mr. Vannier's guilt might be indicated and the Vannier marriage jeopardized by Mrs. Vannier's answers to at least two of the questions. This is sufficient to persuade the court to uphold the privilege as to these questions. But the other apparently lawful acts which were the subject of the other "objective" questions can also incriminate when performed in the context of a conspiracy, an unlawful agreement to accomplish lawful objectives by unlawful means or to accomplish unlawful objectives. For this reason I view it imperative that the privilege against adverse spousal testimony be honored where the government seeks to indict one spouse for a conspiracy involving both and attempts to procure that indictment through incriminatory testimony of the remaining spouse.

Order.

In the United States District Court for the Middle District of Florida, Tampa Division.

IN RE: GRAND JURY PROCEEDINGS, MITCHELL HERMANN. No. 81-1.

Filed June 18, 1981.

Grand Jury proceedings concerning Mr. Hermann were conducted on June 17, 1981, along with proceedings concerning Francine Vannier. The proceedings were, with the consent of all the parties, conducted concurrently with one record being made. Separate orders will be entered as to each.

Mr. Hermann was granted use immunity under Title 18, Section 6001 et seq., United States Code on June 10, 1981. Thereafter, upon a motion of the government an order was entered directing him to show cause on June 17 why he should not be punished for contempt, or as a recalcitrant witness under the provisions of Title 28, Section 1826, United States Code.

At hearing on June 17, he appeared with counsel. The Court announced that he would be given an "uninhibited adversary hearing."

His counsel filed a renewed motion for hearing on his claim that Grand Jury 81-1 was biased against him and the Church of Scientology as a result of prejudicial publicity, filing a supplemental memoranda in support thereof, together with the affidavit of a Mr. Jay Schulman and a suggestion that a record of related proceedings be incorporated for the purpose of that hearing. The Court considered the affidavit and memoranda, granted the motion for incorporation of record and denied the claim of prejudicial publicity.

Counsel then filed a motion for disclosure of electronic surveillance. That motion was, in effect, granted when

Court received and considered an affidavit of Terrance A. Bostic, an Assistant United States Attorney, and upon consideration of the motion, the memoranda in support thereof, the affidavit of Mr. Bostic, the affidavit of Mitchell Hermann, and the affidavits and other matters attached to the motion, the Court was and is satisfied that requirements of *Gelbard v. United States*, 408 U.S. 41 (1972) and Title 18, Section 3504(a), United States Code had been made and that there was no showing of a violation or potential violation of the fourth amendment or any law in connection with the questions propounded by the Grand Jury.

Counsel then filed and relied upon a memoranda in opposition to a finding of contempt which raised again matters that had previously been presented to the Court at the time of the hearing for the grant of use immunity. Upon consideration, relief claimed therein was denied and the opposition overruled.

Counsel for Mr. Hermann then announced that there was no further matters to be heard in opposition to proceeding with the inquiry of Mr. Hermann.

The government produced the transcript of the questions propounded to Mr. Hermann before Grand Jury 81-1 with his responses. By stipulation the transcript was received in evidence and made a part of the record.

The Court inquired of Mr. Hermann whether or not he would, if given the opportunity, answer the questions propounded by the Grand Jury; he said that he would not and did not intend to, whereupon I found and adjudged Mr. Hermann to be in civil contempt of this Court and of Grand Jury 81-1, and pursuant to Section 1826(a), Title 28, United States Code he was committed to the custody of the Attorney General or his authorized representatives, to be confined at a suitable place until such time as said Mitchell Hermann

was, or is willing to give testimony to and before Grand Jury 81-1 of this Court, provided that no such period of confinement shall exceed the life of the term of said Grand Jury, including extensions, or eighteen (18) months after the date of such confinement, which ever first occurs.

Upon such ruling, respondent Hermann indicated an intention to appeal under the provisions of Section 1826(b), Title 28, United States Code and moved that appeal bond be fixed and that conditions be set for release on bail.

After hearing the Court found that an appeal is and would be frivolous and taken for delay and denied application for bail pending appeal.

IT WAS AND IS SO ORDERED at Tampa, Florida this 18th day of June, 1981.

/s/ Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE